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5 Attorneys for Nugget Construction Co., Inc.,
6 and USF&G, Defendants

7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

8 UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
9 STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
10 STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
11 Handling, on its own behalf,)

No. A98-009 CIV (HRH)

12 Plaintiffs,)

13 and)

14 UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
d/b/a Marathon Fuel Service, and)
15 SHORESIDE PETROLEUM, INC., d/b/a)
Marathon Fuel Service, on its own)
16 behalf,)

17 Intervening Plaintiffs,)

18 and)

19 METCO, INC.,)

20 Intervening Plaintiff,)

21 vs.)

22 NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
23 STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

24 Defendants.)
25

MEMORANDUM IN OPPOSITION OF
NORTH STAR'S MOTION AND
MEMORANDUM FOR SUMMARY
JUDGMENT AGAINST USF&G
UPON ITS AFFIRMATIVE
DEFENSES

Introduction

In its Motion for Summary Judgment Against USF&G Upon Its Affirmative Defenses ("Motion"), North Star seeks to strike USF&G's Affirmative Defenses via Fed. R. Civ. Pro. 56, rather than properly address the issue pursuant to Rule 37. It has done so, we must presume, because it wished to avoid the obligation to (1) meet and confer in good faith, and (2) first obtain an order compelling supplementation of USF&G's interrogatory responses before bringing a motion to strike USF&G's pleadings. North Star has made no effort to accomplish either of these requirements before bringing this Motion.

Beyond the procedural deficiencies in North Star's Motion, the fact remains that North Star's assertion that USF&G failed to provide any response to the Interrogatories is false. USF&G adopted the Responses provided by Nugget in its own Response to the same interrogatory, which is what is typically done in matters of this type. Of the two "Surety" Affirmative Defenses Nugget did not answer, neither requires further explanation, as both are a purely legal matter, with one simply reserving the surety's right to its principal's Defenses.

North Star's Motion is procedurally, legally and factually flawed, such that the motive for bringing it must be questioned. The Motion is so groundless that its only purpose appears to be to require USF&G to expend resources answering it. Based on the arguments set forth below, North Star's Motion should be summarily denied.

Factual Background

In February 2006, North Star propounded similar sets of interrogatories on Nugget and USF&G respectively. In response, Oles Morrison provided to North Star Nugget's answers and Barokas Martin separately provided USF&G's answers. One of the interrogatories that appeared on both discovery requests sought the factual basis for each of the Affirmative Defenses asserted in Defendants' Answer. This is the only interrogatory that is at issue in the present Motion.

Because North Star ignores in its Motion the actual response provided by Nugget to the inquiry on Affirmative Defenses, it is provided in its entirety herein (emphasis added):

Defendant Nugget incorporates herein its General Objections stated above. In addition, Nugget objects to this interrogatory as it is duplicative given the extensive deposition testimony taken in this matter that covers many of the inquiries made herein.

Affirmative Defense No. 1: Plaintiff asks Nugget to provide the facts constituting the absence of a contract between itself and Plaintiff; i.e. it seeks to have Nugget prove a negative. To do so, Nugget refers Plaintiff to the totality of the discovery taken in this case, including the depositions of Nugget's and Plaintiff's personnel. From that discovery, it is evident that there was never a "meeting of the minds" between the parties required to form a contractual relationship.

Affirmative Defense No. 2: The fact that Plaintiff was a second-tier supplier to a material supplier was decided in the 9th Circuit decision dated September 27, 2001.

Affirmative Defense No. 3: With regard to Nugget and not USF&G, this Affirmative Defense is withdrawn.

Affirmative Defense No. 4: This Affirmative Defense presents a legal question under the Miller Act. To the extent Plaintiff's claims are not covered under the Act and the cases interpreting it, they are not recoverable under the Miller Act cause of

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1 action set forth in Plaintiff's complaint (e.g. tort claims,
2 punitive damages, attorneys' fees, etc.).

3 Affirmative Defense No. 5: With regard to Nugget and not
4 USF&G, this Affirmative Defense is withdrawn.

5 Affirmative Defense No. 6: With regard to Nugget and not
6 USF&G, the Affirmative Defense relating to "unclean hands" is
7 withdrawn. As to the Defense of laches, Plaintiff's waited
8 seven years from the time the events on the project occurred
9 before it amended its complaint to incorporate numerous causes
10 of action that had not been previously brought. The statute of
11 limitations had long ago run on these claims and it is now
12 difficult to reconstruct all of the events surrounding the
13 project.

14 Affirmative Defense No. 7: With regard to Nugget and not
15 USF&G, this Affirmative Defense is withdrawn.

16 Affirmative Defense No. 8: Plaintiff's personnel have
17 testified that it was its policy to invoice on a weekly basis
18 for work performed and that 30 days later it would expect
19 payment. On this project, Plaintiff continued to work in spite
20 of the fact that it did not receive timely payment from Spencer
21 Rock Products for the work Plaintiff had performed. By
22 continuing to provide Spencer Rock Products services in the
23 face of non-payment, Plaintiff failed to mitigate its damages.
24 In addition, Plaintiff did not inform Nugget timely of Spencer
25 Rock Product's failure to make timely payment. Once it did so
and Nugget informed Plaintiff that Nugget was not responsible
for Plaintiff's payments, Plaintiff ceased performing work and
incurring additional expenses.

Affirmative Defense No. 9: See response to Affirmative Defense
No. 8. In addition, Plaintiff's contract was with Spencer Rock
Products. To the extent Plaintiff was owed money and not paid,
the responsibility for that lays with Spencer Rock Products.
This is especially true with regard to the first two barges of
material loaded by Plaintiff, as Spencer Rock Products had been
paid as provided for in the contract by Nugget for that effort.

Affirmative Defense No. 10: With regard to Nugget and not
USF&G, this Affirmative Defense is withdrawn.

Affirmative Defense No. 11: See response to Affirmative
Defense No. 8.

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1 Affirmative Defense No. 12: This Affirmative Defense is on
2 behalf of USF&G, and therefore, this Interrogatory must be
addressed to it.

3 Affirmative Defense No. 13: See response to Affirmative
4 Defense No. 12.

5 Affirmative Defense No. 14: To the extent Plaintiff's claims
arise in contract, punitive damages are legally barred.

6 Affirmative Defense No. 15: See response to Affirmative
7 Defense No. 8.

8 Affirmative Defense No. 16: Plaintiff's contract was with
9 Spencer Rock Products, not Nugget. As such, Spencer Rock
10 Products is responsible for making payment to Plaintiff for any
11 work performed. Spencer Rock Products was paid \$147,000 by
12 Nugget for the first two loads of rock, which funds Spencer
13 Rock Product refused to use to pay its suppliers. To avoid
14 having to pay its suppliers, Spencer Rock Products
15 intentionally mislead those suppliers by telling them that it
had received no money from Nugget. Spencer Rock Products also
failed to inform its suppliers that its entitlement to further
payment from Nugget would likely be reduced because of Spencer
Rock Product's inability to produce the required rock for the
project and the necessity of Nugget supplementing Spencer Rock
Product's work force and equipment. Any harm caused to
Plaintiff on this project was the result of Spencer Rock
Product's duplicity in dealing with both Plaintiff and Nugget.

16 In answering the same Interrogatory posed to USF&G, it responded
17 by adopting Nugget's position on the Affirmative Defenses:

18 See Response of Defendant, Nugget Construction, Inc., to a
19 similar Discovery Request as Answering Defendant was also being
20 represented by Oles Morrison Rinker & Baker on the date the
Affirmative Defenses were forwarded on behalf of both
Defendants. ...

21 Motion, Sewright Aff., Ex. 3, Answer to Interrogatory No. 10, pp. 3-4.

22 In addition to not citing to the court the Nugget's Responses
23 adopted by USF&G, North Star fails to set forth the only Affirmative
24 Defenses Nugget did not specifically answer, Nos. 12 and 13 (which are

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1 highlighted above in Nugget's responses), as they relate exclusively
2 to the surety. Those Affirmative Defenses are:

3 12. Assuming, arguendo, that North Star is in privity with
4 Nugget, the Surety has no liability in excess of the penal sum
of the bond.

5 13. Assuming, arguendo, that North Star is in privity with
6 nugget, the Surety is entitled to assert and hereby asserts on
7 its own behalf and for its own benefit all defenses that could
be asserted by its principal, whether or not such defenses are
actually asserted by its principal.

8 Given the nature of these two Affirmative Defenses, what "factual
9 basis" does North Star believe are necessary to support them? The
10 correct answer is: there are none. Affirmative Defense No. 12 is
11 simply a legal proposition that the surety cannot be liable for more
12 than the penal sum of the bond. Except to the extent that this
13 Affirmative Defense may apply to the separate "bad faith" claim
14 brought by plaintiffs against USF&G (which it does not), this Defense
15 requires no further explanation. However, even if such an explanation
16 was required, USF&G's position with regard to the bad faith claims are
17 presented in the remainder of its response to Interrogatory No. 10:

18 ... The only independent claim forwarded by Defendants against
19 Answering Defendants is one based on bad faith. There exists
20 absolutely no evidence of any bad faith of Answering Defendant.
21 Answering Defendant has no obligation to settle the litigation
independent from its principal, and chose not to do so. This
is not bad faith. There exists no intelligible articulated
claim for bad faith against Answering Defendant outside this
specific allegation. The matter will be addressed in a Summary
22 Judgment Motion, as will the Amended Affirmative Defense of
23 Statute of Limitations forwarded by the undersigned, as the
24 Statute of Limitations expired on the claims asserted by
Plaintiff against Defendant long before Plaintiff's Amended
Complaints dated August 31, 2005.

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1 As to Affirmative Defense No. 13, it says exactly what USF&G did
2 in its Response to Interrogatory No. 10—adopt the principal's,
3 Nugget's, Affirmative Defenses as the surety's. Again, there is
4 nothing more to be said to support this Defense.

5 The first time North Star ever raised the issue of its
6 displeasure with USF&G's discovery responses was on April 27, 2006,
7 two business days before filing the present Motion, which also
8 happened to be the deadline for all dispositive motions in this case.
9 In counsel's e-mail on the subject, he ended with the statement:
10 "Please consider this our meet and confer under the federal rules on
11 this matter, if I do not hear from you as requested." See Motion,
12 Sewright Aff., Ex. 7.

13 North Star, however, fails to be candid with the tribunal in its
14 presentation of all of the relative evidence on this issue. On the
15 morning after North Star's e-mail, counsel for Nugget responded as
16 follows:

17 It is unclear to me what specific complaint you have with
18 regard to the Discovery Responses provided by Nugget on March
19 20, 2006. You indicate that you believe Nugget has provided
20 insufficient factual basis for several of its affirmative
21 defenses, but you fail to specify which Responses you believe
22 are inadequate and/or why you believe them to be so. This
23 lack of specificity does not satisfy the "meet and confer"
24 obligations under the Federal Rules, and Nugget is not
25 required to supplement what it already believes are adequate
responses without further explanation on your part.

As to the USF&G Responses, I will discuss the issue with Herb
and one of us will bet [sic] back to you.

1 Despite this acknowledgement by Defendants that North Star was
2 raising an issue with regard to discovery responses, North Star
3 brought its Motion without ever discussing its concerns with either
4 counsel for USF&G.

5 Argument

6 A. North Star Seeks Summary Judgment As A Way Of Avoiding Compliance
7 With Rule 37.

8 North Star's Motion is nothing more than an attempt to strike
9 USF&G's Affirmative Defenses as a sanction for what it believes to be
10 inadequate responses to an interrogatory it propounded. North Star
11 makes no attempt to articulate how or why Rule 56 is applicable to its
12 request. The only explanation lies in the fact that North Star wishes
13 to avoid the process required under Rule 37 before a court can impose
14 a sanction as severe as striking a party's defenses.

15 That North Star realizes the overreaching nature of its Motion is
16 demonstrated by the inclusion of footnote 4 in the Motion, which asks
17 the court, should it determine that Summary Judgment is not warranted,
18 to compel USF&G's response to the interrogatory. Of course, a motion
19 pursuant to Rule 37 (a) (2) (B)—a motion to compel—is the appropriate
20 remedy when a party is dissatisfied with the adequacy of an
21 interrogatory response, not a motion for summary judgment or even a
22 motion for sanctions under Rule 37 (b).

23 In this case, USF&G provided a response to Interrogatory No. 10,
24 in which it adopted Nugget's response with regard to the Affirmative
25 Defenses and stated its position with regard to its defenses against

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1 the bad faith claim. Under this circumstance, North Star must bring a
2 motion seeking to compel supplementary responses if it finds these
3 answers insufficient (which, as explained below, they were not). With
4 the exception of Footnote 4 in the Motion, North Star has never sought
5 to compel further information in USF&G's responses, and until two
6 business days before filing its Motion never even communicated its
7 concerns to counsel for USF&G.

8 Moreover, even if the court were to convert North Star's Summary
9 Judgment Motion to a motion to compel, North Star has failed to make a
10 good faith effort to comply with its "meet and confer" obligation
11 under Rule 37 (a) (2) (B). North Star initially relies on a letter
12 sent from Metco's and Shoreside's counsel to counsel for USF&G as
13 evidence that North Star met and conferred with regard to its
14 propounded discovery responses. See Motion, Sewright Aff., Ex. 5.
15 However, whether the party seeking to compel discovery can rely on
16 another party's complaints regarding discovery satisfies a meet and
17 confer obligation is doubtful, and North Star cites no authority to
18 support such a proposition. However, even if Mr. Shamburek's letter
19 constitutes a "meet and confer," which it does not, *Soto v. City of*
20 *Concord*, 162 F.R.D. 603, 622-23 (N.D.Cal. 1995)(letter insufficient to
21 satisfy meet and confer duty), the only objection raised therein
22 relates to the explanation of the defenses to the bad faith and
23 statute of limitation defenses, not those provided by Nugget and
24

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1 adopted by USF&G. Thus, there is not a whisper of concern over the
2 remainder of the USF&G responses until April 27, 2006.

3 In Mr. Sewright's e-mail of April 27, 2006 e-mail, North Star
4 suffers from the same misunderstanding as forms the basis for this
5 Motion; i.e. North Star's failure to recognize USF&G's adoption of
6 Nugget's Interrogatory Response on the issue of Affirmative Defenses.
7 This misunderstanding highlights the reason why the Rules require a
8 "meet and confer" before filing a motion to compel. North Star's
9 misunderstanding is readily rectifiable through a mere discussion
10 between counsel and/or a clarification in USF&G's Response to the
11 Interrogatory. Because North Star never made an attempt to discuss
12 this misunderstanding with either counsel for USF&G, no such
13 illumination has been provided. This is not USF&G's fault; the burden
14 of complying with the meet and confer obligation falls squarely on
15 North Star's shoulders.

16 B. The Sanction Sought By North Star Is Inappropriate Absent USF&G's
17 Failure To Comply With An Order To Compel.

18 Rule 37 (b) (2) provides that a court may strike out pleadings if
19 "a party fails to obey an order to provide or permit discovery,
20 including an order made under subdivision (a) of this rule." Prior to
21 imposing the severe sanctions provide for in Rule 37 (b), there must
22 first have been a violation of a court order. *United States v. One*
23 *1987 BMW 325*, 985 F.2d 655, 660-61 (1st Cir. 1993) (improper to strike
24 party's claim absent violation of an order compelling discovery).

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1 As discussed above, North Star has never sought an order to
2 compel USF&G to supplement its discovery responses. As such, it has
3 no basis for asking this court to strike USF&G's Affirmative Defenses,
4 and its Motion, for either summary judgment or for Rule 37 sanctions,
5 should be denied. North Star's attempt to have sanctions levied
6 against USF&G without complying with either the good faith "meet and
7 confer" requirement or obtaining a motion to compel by itself should
8 entitle USF&G to fees for having to respond to this baseless request.

9 C. North Star's Misnamed Motion For Summary Judgment Is Without
10 Merit

11 At first blush, the thrust of North Star's Motion is an attempt
12 to strike USF&G's Affirmative Defenses because it somehow was denied
13 information necessary to the prosecution of its claims. However, the
14 fact that North Star failed to even mention the Affirmative Defenses
15 it believes require supplementation belies its feigned interest in
16 additional discovery. In its Motion, North Star simply relies on its
17 belief that USF&G's adoption of Nugget's Interrogatory Responses never
18 happened, and therefore, USF&G provided no Responses at all. This
19 conveniently absolves North Star of any obligation to specifically set
20 forth its objections to USF&G's Responses. Given that those Responses
21 were perfectly adequate, North Star's avoidance of that issue is
22 understandable.

23 While a plain reading of USF&G's Response dispenses with North
24 Star's argument that USF&G did not provided one, let there be no
25 mistake that USF&G, as it reserved the right to do in its pleadings,

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1 adopts the responses provided by its principal. As such, there is no
2 valid argument that USF&G "failed" to answer the propounded
3 Interrogatory.

4 As discussed above, the only Affirmative Defenses that were not
5 answered by Nugget (and as such, not adopted by USF&G) relate to two
6 issues that are purely legal, the limitation to the penal sum of the
7 bond and the surety's right to its principal's defenses. North Star
8 has made no showing that either of these require factual support, or
9 that the lack of an answer providing said support is grounds to strike
10 them from USF&G's Answer.

11 With regard to North Star's complaint regarding the adequacy of
12 USF&G's Affirmative Defenses relating to "bad faith" and statute of
13 limitation, the Response sufficiently explains USF&G's position
14 regarding each. The fact remains that on the "bad faith" Affirmative
15 Defense, North Star has asked USF&G to prove a negative; i.e. prove
16 the lack of evidence for bad faith. As also mentioned in the
17 Response, the issue would be dealt with in greater detail by motion,
18 which has now happened. This is similarly true for the issue of the
19 statute of limitation—a motion is now pending.

20 Conclusion

21 North Star has attempted an end-run around the Federal Rules of
22 Civil Procedure by concocting a motion for summary judgment out of a
23 simple discovery dispute. Although the court could theoretically
24 ignore the title of the Motion and treat it as a discovery motion, it

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1 should decline to do so, because North Star has also failed to
2 properly pursue this matter under Rule 37. North Star made only a
3 last minute, half hearted, not in good faith, attempt to "meet and
4 confer" on this matter, which should preclude it from even seeking a
5 motion to compel. More importantly, the sanction North Star seeks—the
6 striking of USF&G's Affirmative Defenses—requires North Star to first
7 obtain an order compelling the discovery it seeks. As no such order
8 exists, North Star's requested sanction is premature.

9 Finally, as the record demonstrates, there is no deficiency in
10 USF&G's Response to the propounded Interrogatory. First, USF&G fully
11 adopted the Responses provided by Nugget. Second, those Responses not
12 provided by Nugget required no "factual basis" to be maintained.
13 Third, USF&G's Responses relating to "bad faith" and statute of
14 limitation were fully adequate and each is now the subject of a motion
15 before the court.

16 Based on all of the foregoing, North Star's Motion should be
17 denied.

18 Dated: May 11, 2006

19 OLES MORRISON RINKER & BAKER LLP
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21 Inc., and United States Fidelity
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th
day of May, 2006, a true and correct
copy of the foregoing was served

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